

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL M. JADALI, D.O.,

Plaintiff-Appellee,

v

MICHIGAN NEUROLOGY ASSOCIATES, P.C.,
and MICHIGAN NEUROLOGY ASSOCIATES
PROFIT SHARING PLAN,

Defendants-Appellants.

UNPUBLISHED

December 29, 2011

No. 297975

Macomb Circuit Court

LC No. 2007-004188-CK

Before: SHAPIRO, P.J., and WHITBECK and GLEICHER, JJ.

PER CURIAM.

This case arises from a dispute regarding an employment agreement. Defendants Michigan Neurology Associates, P.C. and Michigan Neurology Associates Profit Sharing Plan appeal as of right a judgment in favor of plaintiff Michael M. Jadali, D.O., following a jury trial. On appeal, defendants argue that the trial court erred in denying their motions for directed verdict and judgment notwithstanding the verdict (JNOV) because (1) the parties' employment agreement unambiguously denied Dr. Jadali a right to recover for receipts collected after his employment ended, (2) the employment agreement unambiguously permitted Michigan Neurology Associates to deduct its pension payment for Dr. Jadali from his compensation, and (3) the employment agreement and the Family and Medical Leave Act (FMLA)¹ did not entitle Dr. Jadali to take off more time than allowed by contract while retaining the full measure of his contractual compensation. We affirm.

I. FACTS

A. OVERVIEW OF COMPENSATION

Dr. Jadali, a physiatrist specializing in physical medicine and rehabilitation, began working for Michigan Neurology Associates on August 1, 2003. Dr. Jadali signed a standard written employment contract provided by Dr. Thomas Giancarlo, the 90 percent owner and

¹ 29 USC 2601 *et seq.*

senior managing partner of Michigan Neurology Associates. Attorneys working on behalf of Michigan Neurology Associates wrote the contract. The initial employment agreement was for two years, and Michigan Neurology Associates later exercised its option under the contract to extend Dr. Jadali's employment for a third year. Under the employment agreement, Dr. Jadali's compensation consisted of 50 percent of his collected receipts, minus a regular draw on his commission advanced under normal payroll procedures for salaried employees. In particular, the contract stated:

3. Compensation: Doctor's compensation for services rendered during the Employment Period shall be determined in accordance with the following:

(a) Doctor shall receive a draw in the amount of \$130,000 annually ("base compensation") to be advanced in accordance with the Company's normal payroll procedure for salaried employees. On a quarterly basis, the Company shall perform the following calculations:

(i) Doctor's gross collected receipts as of the last day of the month immediately preceding the date that this calculation is made;

(ii) That portion of the Doctor's draw as set forth in section 3(a) above that has been advanced to Doctor as of the date of this calculation plus direct Doctor benefits;

(iii) The amount calculated in section 3(a)(i) minus 50% (the estimated office overhead factor); and

(iv) The difference between section 3(a)(ii) and 3(a)(iii).

It is further agreed that in the event the amount in section 3(a)(iv) exceeds \$1.00, the Doctor shall be required to repay said difference to the Company within sixty (60) days of said calculation being computed. The company will attempt to accomplish this through pay roll [sic] adjustments.

It is further agreed that the Company will make necessary incremental adjustments to section 3(a)(ii) any time after the third quarter to allow for section 3(a)(ii) to equal section 3(a)(iii) cumulatively by the eighth quarter of the two year employment period.

EXAMPLE CALCULATION:

@ end of 2nd quarter Doctor has received \$65,000

Collected receipts = \$100,000

Direct Doctor benefits = \$10,000

Doctor costs = \$65,000 + \$10,000 = \$75,000

Collection minus 50% overhead = \$50,000

Overpaid amount = \$75,000 - \$50,000 = \$25,000

Company would adjust income over next 60 days or longer or will charge Doctor directly.

Dr. Giancarlo added the sample calculation to Michigan Neurology Associates' standard contract because Dr. Jadali had a lot of questions regarding how he would be paid. At trial, Dr. Jadali explained his understanding of how he was paid:

A draw, to my understanding was basically I'm working on commission that is calculated on a quarterly basis. Meanwhile I get to take my quote, end quote, salary that would be deducted from the money that comes in at the end of the quarter and Dr. [Giancarlo] will calculate it and give me 50 percent of the money collected, minus the draw that he already paid me. So I'm working on 50 percent commission.

During his employment at Michigan Neurology Associates, Dr. Jadali always produced more than his draw, and he was one of the most productive doctors at Michigan Neurology Associates. Michigan Neurology Associates paid him \$165,000 in 2004, and \$293,000 in 2005. He was on track to make approximately \$350,000 in his final year.

The employment agreement also contained a provision regarding participation in Michigan Neurology Associates' pension plan. That provision stated:

6. Profit Sharing Plan: The Doctor may be eligible to participate in the Michigan Neurology Associates, P.C.'s Pension Plan (the 'Plan') pursuant to the eligibility provisions and other terms and conditions contained therein, provided the Company shall have the right to amend or terminate the Plan at any time in its sole discretion.

Although Dr. Jadali and Michigan Neurology Associates discussed extending Dr. Jadali's employment beyond his third year, they were unable to reach an agreement, and Dr. Jadali's final day of work at Michigan Neurology Associates was scheduled for July 31, 2006. Dr. Jadali received his last draw check on July 14, 2006, for the pay period ending July 10, 2006. Dr. Jadali continued to work through July 31, 2006, as required by his contract, but he did not believe that he was working for free. Dr. Jadali then moved to California and started his own practice beginning in September 2006.

B. PAYMENT FOR COLLECTIONS RECEIVED AFTER LAST DATE OF EMPLOYMENT

After Dr. Jadali left Michigan Neurology Associates, a dispute arose regarding whether he was entitled to 50 percent of receipts that were generated by his services during the employment period but that Michigan Neurology Associates collected after his last date of employment on July 31, 2006. Shortly before trial, Michigan Neurology Associates paid Dr. Jadali \$10,367 for his remaining share of receipts collected through July 31, 2006, but it did not pay him for receipts collected after that date. Dr. Jadali explained that he believed he was

entitled to 50 percent of the receipts collected after his departure because it was understood that patients did not usually pay in full at the time services were rendered; it took time for the payments to be processed through the applicable insurance company, and then payment would mailed “two weeks to months” later. Also, a memo from Michigan Neurology Associates’ office manager indicated that many of Dr. Jadali’s patients were from automobile accident and worker’s compensation cases, often causing a delay in payment.

Dr. Giancarlo did not dispute that approximately \$81,000 in receipts were collected after Dr. Jadali left that were generated by Dr. Jadali’s services during the employment period. Dr. Giancarlo opined, however, that Michigan Neurology Associates was entitled to keep all of the post-termination collections rather than pay 50 percent to Dr. Jadali. Dr. Giancarlo explained that when a doctor first joins Michigan Neurology Associates, it is the least productive year of his or her career. Michigan Neurology Associates incurs start-up costs when a doctor is hired, including recruiter fees, attorney fees, accountant fees, licensing fees, and hospital application fees. According to Dr. Giancarlo, Michigan Neurology Associates was willing to incur these start-up costs because “when the doctor leaves, that cash flow still follows into the practice to compensate for all those initial costs, that we incurred, before he was, in fact, a productive member of the team.” Dr. Giancarlo asserted that such a contractual arrangement is standard in the medical industry with non-partner employees.

C. DEDUCTION OF MICHIGAN NEUROLOGY ASSOCIATES’ PAYMENT INTO PENSION PLAN

Another area of dispute concerned whether Michigan Neurology Associates’ payment into a pension plan on Dr. Jadali’s behalf was properly deducted from his compensation. The employment agreement provided for a deduction of “that portion of the Doctor’s draw as set forth in section 3(a) above that has been advanced to Doctor as of the date of this calculation *plus direct Doctor benefits*.” According to Dr. Jadali, Dr. Giancarlo never explained to him that Michigan Neurology Associates’ contribution to the pension plan on his behalf would be deducted from his compensation as a direct doctor benefit. Dr. Jadali explained why he opposed deduction of Michigan Neurology Associates’ contribution from his pay:

Q. And at some point in time do you understand that Michigan Neurology was making contributions on your behalf to the profit sharing plan?

A. Yes.

Q. And were the contributions that Michigan Neurology made, were those being deducted dollar for dollar from your pay?

A. Yes.

Q. Did you have an issue with that?

A. If it’s my contribution and the money belongs to me.

Q. What if it’s the employer contributions?

A. Then that becomes an issue for me because if that's the employer's plan and the employer needs to contribute, that needs to come from the employer, not from me. So if it's an employer plan that they deducted from me, no.

Q. Now, are you trying to change the rules of vesting?

A. Absolutely not.

Q. Do you understand that if the plan has a vesting provision that—and if the employer made the contributions that it might not all be vested?

A. I don't know any of the details of vesting or non vesting [sic] but that's my impression on it.

Q. So why are you seeking reimbursement for the amount of the employer contributions that were deducted from your pay?

A. Because the money came from me but it is supposed to be the employer contribution and I don't have access to all that.

Michigan Neurology Associates' total employer contribution on Dr. Jadali's behalf was \$10,500, and it deducted the entire amount from Dr. Jadali's pay. Dr. Jadali's vested amount was \$8,039. Under the pension plan, the employer was to make these contributions.

Dr. Giancarlo testified that his understanding of the employer contribution requirement in the pension plan was "that the employer has to write that check." He explained that Michigan Neurology Associates wrote the check for the \$10,500 contribution on Dr. Jadali's behalf. He understood that an employee contribution cannot be subject to vesting because it is the employee's money. Dr. Giancarlo acknowledged that the \$10,500 employer contribution was included in the calculation of Dr. Jadali's pay such that he received \$10,500 less because of the contribution. He also understood that the contribution was subject to vesting under federal regulations. The money was deducted from Dr. Jadali's pay before it was contributed to the pension plan. Michigan Neurology Associates' retirement plan administrator testified that the employer contributions have to come directly from the employer and that the money here was paid into the plan through Michigan Neurology Associates, qualifying it for tax deferred status.

D. DEDUCTIONS FOR MISSED WORK

The final relevant dispute concerned deductions from Dr. Jadali's pay for 13 or 14 days that he missed work. In 2006, Dr. Jadali missed about 10 days of work as a result of his wife's miscarriage. Dr. Jadali missed three or four additional days of work in 2006 because he suffered an acute appendicitis, requiring surgery. Dr. Jadali did not request to be paid for the missed days but contested Dr. Giancarlo's deduction of \$11,753 from his pay for the missed days. Dr. Giancarlo acknowledged that even if he had not deducted the \$11,753, Dr. Jadali would still have been unpaid for the missed days.

E. DR. JADALI'S COMPLAINT

In light of these disputes regarding Dr. Jadali's compensation, Dr. Jadali filed this action alleging claims for breach of contract, promissory estoppel, unjust enrichment, violation of the Employee Retirement Income Security Act (ERISA),² and violation of the FMLA.

F. TRIAL AND MOTION FOR DIRECTED VERDICT

The case proceeded to trial on Dr. Jadali's claims. After Dr. Jadali rested, defendants orally moved for a directed verdict, arguing that Dr. Jadali had failed to present sufficient evidence in support of his claims. The trial court denied defendants' motion because "[t]here's enough to go to the jury to decide the case." The parties agreed to instructions submitting the interpretation of the employment agreement to the jury.

The jury found that Michigan Neurology Associates breached its contract with Dr. Jadali by failing to pay him compensation for services performed on or before July 31, 2006, but collected after that date. Dr. Jadali's damages resulting from Michigan Neurology Associates' failure to pay him this compensation amounted to \$40,874. In light of its resolution of the contractual issue, the jury did not decide whether Dr. Jadali was entitled to prevail on an unjust enrichment theory. The jury also found that Michigan Neurology Associates breached the contract by deducting employer pension contributions from Dr. Jadali's compensation, entitling Dr. Jadali to \$10,500 in damages for that claim.³ Finally, the jury found that Michigan Neurology Associates breached its contract with Dr. Jadali and violated the FMLA by making a deduction from his compensation for days off. The amount that Michigan Neurology Associates improperly deducted for days off was \$11,753.

G. FEES, COSTS, SANCTIONS, AND ENTRY OF JUDGMENT

Dr. Jadali filed a petition for attorneys' fees and costs and moved for case evaluation sanctions and for entry of judgment. The trial court ordered Michigan Neurology Associates to pay Dr. Jadali case evaluation sanctions of \$25,250, liquidated damages under the FMLA of \$11,753, attorney fees and costs under the FMLA of \$6,737, the jury verdict of \$63,127, and statutory prejudgment interest. On March 9, 2010, the trial court entered a judgment awarding a total amount of \$118,675, and interest at the rate set forth in MCL 600.6013(8) from February 19, 2010, until the date of satisfaction of the judgment.

² 29 USC 1101 *et seq.*

³ Dr. Jadali's ERISA claim was not submitted to the jury because it was a matter for the trial court to decide. After trial, Dr. Jadali indicated that the trial court did not need to decide the ERISA claim given the jury's finding under the breach of contract theory that it was improper to deduct employer pension contributions from Dr. Jadali's compensation.

H. DEFENDANTS' MOTION FOR JNOV OR A NEW TRIAL

Defendants moved for JNOV or, alternatively, for a new trial. Defendants argued that (1) the contractual language was unambiguous and did not require interpretation by the jury; (2) Michigan Neurology Associates did not breach the contract by failing to pay Dr. Jadali for receivables collected after he left; (3) Michigan Neurology Associates did not breach the contract by deducting money from Dr. Jadali's pay for time off and the FMLA does not require *paid* time off; (4) Michigan Neurology Associates did not breach the contract by deducting employer pension contributions from Dr. Jadali's compensation; (5) testimony regarding the miscarriage by Dr. Jadali's wife was prejudicial to defendants; and (6) the jury's award of the amount deducted for the pension contribution constituted a double payment to Dr. Jadali because the amount deducted was available to Dr. Jadali upon vesting.

In response, Dr. Jadali argued that (1) the meaning of an ambiguous contract is a question of fact for the jury, and the parties stipulated to the jury instructions and the verdict form submitting the interpretation of the contract to the jury; (2) the evidence supported the jury's finding that Dr. Jadali was entitled to compensation for services performed on or before July 31, 2006, and for which receivables were collected after that date; (3) the jury properly found that Dr. Jadali was entitled to reimbursement for amounts that Michigan Neurology Associates deducted from his pay for time off due to medical purposes; (4) the jury correctly found that Michigan Neurology Associates had improperly deducted employer pension contributions from Dr. Jadali's compensation; and (5) description of the medical condition of Dr. Jadali's wife was necessary to establish that he missed work due to the serious health condition of a family member. The trial court denied defendants' motion for JNOV or a new trial without explaining its reasoning.

Defendants now appeal the judgment in favor of Dr. Jadali.

II. WAIVER OF ISSUES

A. LEGAL STANDARDS

Generally, an issue must have been raised before, and addressed and decided by, the trial court to be preserved for appellate review.⁴ Moreover, "[a] party who waives a right is precluded from seeking appellate review based on a denial of that right because waiver eliminates any error."⁵ A waiver is a voluntary and intentional relinquishment or abandonment of a known right.⁶ "The usual manner of waiving a right is by acts which indicate an intention to relinquish it, or by so neglecting and failing to act as to induce a belief that it was the intention and purpose

⁴ *Hines v Volkswagen of America, Inc.*, 265 Mich App 432, 443; 695 NW2d 84 (2005).

⁵ *The Cadle Co v City of Kentwood*, 285 Mich App 240, 255; 776 NW2d 145 (2009).

⁶ *Quality Prod and Concepts Co v Nagel Precision, Inc.*, 469 Mich 362, 374; 666 NW2d 251 (2003); *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 69; 642 NW2d 663 (2002).

to waive.”⁷ “A party who expressly agrees with an issue in the trial court cannot then take a contrary position on appeal.”⁸ “A party is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute.”⁹

B. INTERPRETATION OF EMPLOYMENT AGREEMENT

Defendants argue that the parties’ employment agreement provision regarding the calculation of Dr. Jadali’s compensation was unambiguous and should have been decided by the trial court as a matter of law. But defendants waived this argument. When defendants moved for a directed verdict, they did not make such an argument. Further, defendants acquiesced in submitting the interpretation of the contract to the jury. The trial court instructed the jury:

The written agreement, along with all attachments thereto, is to be considered in determining the existence or nature of the contractual duties owed by Michigan Neurology Associates to Dr. Jadali. In determining the parties’ intentions under the written contract, you should consider the agreement as a whole, including all of its parts and attachments.

You should interpret the words of the contract by giving them their ordinary and common meaning.

Initially, you must determine the meaning of the provision contained in the contract that was executed by the parties. Interpreting the contract’s terms requires a determination by you as to the intent of the parties in entering the contract. The determination of intent allows you to take into consideration extrinsic evidence such as the parties’ conduct, the verbal statements of their representatives, and past practice between the parties. If, after taking such evidence into consideration, you are unable to determine what the parties intended their contract to mean, you may then, and only then, construe the document against the party that drafted the contract.

After the trial court completed its instructions, it asked the attorneys if they were satisfied with the instructions as read. Both Dr. Jadali’s counsel and defense counsel expressed satisfaction with the instructions. Thus, because defendants’ counsel acquiesced in submitting the interpretation of the contract to the jury, defendants cannot now harbor error on that basis as an

⁷ *The Cadle Co*, 285 Mich App at 254-255, quoting *Book Furniture Co v Chance*, 352 Mich 521, 526-527; 90 NW2d 651 (1958).

⁸ *Grant v AAA Michigan/Wisconsin, Inc (On Remand)*, 272 Mich App 142, 148; 724 NW2d 498 (2006).

⁹ *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002), quoting *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989).

appellate parachute.¹⁰ (Although defendants argued in their motion for JNOV that the language of the contract was clear and did not require interpretation by the jury, defendants had by then already waived the issue by agreeing to the instructions, thereby eliminating any error.¹¹)

C. UNJUST ENRICHMENT

Defendants also waived their argument that Dr. Jadali's unjust enrichment claim should not have been submitted to the jury because an express contract existed. Defendants did not argue in their directed verdict motion that an unjust enrichment claim was entirely precluded, but rather, that the evidence failed to establish such a claim. Further, the trial court instructed the jury:

The plaintiff claims that the defendant was unjustly enriched in keeping the plaintiff's funds. To establish a claim of unjust enrichment, the plaintiff must prove: 1) Receipt of a benefit by the defendant from the plaintiff; and 2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant.

When unjust enrichment exists, the law operates to imply a contract in order to prevent it. However, if you find that an actual express contract was entered into by the parties covering the same subject matter, you may not allow the plaintiff to recover under the theory of unjust enrichment.

As discussed, at the conclusion of the instructions, Dr. Jadali's counsel and defense counsel each expressed satisfaction with the instructions as read. Thus, by acquiescing in the submission of the unjust enrichment claim as an alternative theory, defendants waived the argument that the jury should not have been permitted to consider unjust enrichment.

III. DISPOSITIVE MOTIONS

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for directed verdict.¹² This Court views the evidence in the light most favorable to the nonmoving party.¹³ "A directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ."¹⁴ This Court also reviews de novo a trial court's decision on a motion for JNOV.¹⁵ This

¹⁰ *Marshall Lasser*, 252 Mich App at 109.

¹¹ *The Cadle Co*, 285 Mich App at 255.

¹² *Genna v Jackson*, 286 Mich App 413, 416; 781 NW2d 124 (2009).

¹³ *Id.*

¹⁴ *Roberts v Saffell*, 280 Mich App 397, 401; 760 NW2d 715 (2008), *aff'd* 483 Mich 1089 (2009).

Court views the evidence and legitimate inferences therefrom in the light most favorable to the nonmoving party to determine whether the moving party was entitled to judgment as a matter of law.¹⁶ “The motion should be granted only when there is insufficient evidence presented to create a triable issue for the jury. When reasonable jurors could honestly reach different conclusions regarding the evidence, the jury verdict must stand.”¹⁷

B. PAYMENT FOR COLLECTIONS RECEIVED AFTER LAST DATE OF EMPLOYMENT

Defendants argue that the trial court erred in denying their motions for directed verdict and JNOV on the issue whether sufficient evidence was presented that Dr. Jadali was entitled to his commission for services rendered during the employment period but where payment was collected after his employment ended.

First, we conclude that the contractual language at issue is ambiguous. “A contract is ambiguous when its words may be reasonably understood in different ways.”¹⁸ Thus, a contract is deemed ambiguous when two provisions irreconcilably conflict with one another or when a term is equally susceptible of more than one meaning.¹⁹ Here, the compensation provision of the parties’ employment agreement may be reasonably understood in different ways. The first sentence of ¶ 3 of the contract states that Dr. Jadali’s “compensation for services rendered *during the Employment Period* shall be determined in accordance with the following: . . .” Paragraph 3(a) then describes the manner of calculating Dr. Jadali’s commission, stating that Dr. Jadali is entitled to 50 percent of his “gross collected receipts as of the last day of the month immediately preceding the date that this calculation is made.” Thus, while the first sentence of ¶ 3 indicates that Dr. Jadali is entitled to “compensation for services rendered during the employment period,” which reasonably means for the *entire* employment period, ¶ 3(a) suggests that Dr. Jadali’s compensation is limited to receipts *collected* as of the last day of the month immediately preceding the date that the calculation is made, thereby potentially barring compensation for services if the receipts are not collected before the date of calculation. Therefore, the terms of the compensation paragraph may reasonably be understood in differing ways: Dr. Jadali is entitled under the contract to compensation for all services rendered *during the employment period*, but yet he could potentially receive *no* compensation for services rendered during a portion of that employment period depending on when the receipts are collected.

Ambiguous contractual language presents a question of fact to be decided by a jury.²⁰ And we further conclude that there was sufficient evidence to present a triable issue for the jury regarding the intended meaning of the ambiguous contractual language.

¹⁵ *Genna*, 286 Mich App at 417.

¹⁶ *Id.*

¹⁷ *Id.* (citations omitted).

¹⁸ *Scott v Farmers Ins Exch*, 266 Mich App 557, 561; 702 NW2d 681 (2005).

¹⁹ *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007).

²⁰ *Cole v Auto-Owners Ins Co*, 272 Mich App 50, 53; 723 NW2d 922 (2006).

Where a written contract is ambiguous, a factual question is presented as to the meaning of its provisions, requiring a factual determination as to the intent of the parties in entering the contract. Thus, the fact finder must interpret the contract's terms, in light of the apparent purpose of the contract as a whole, the rules of contract construction, and extrinsic evidence of intent and meaning.^[21]

The jury should consider relevant extrinsic evidence in determining the meaning of a contract whose language is ambiguous.²² If the jury is unable to determine the parties' intent after considering all relevant extrinsic evidence, the jury may, as a last resort, construe the ambiguities against the drafter of the contract.²³

Here, the contractual language and relevant extrinsic evidence support a conclusion that the intent of the contracting parties was to compensate Dr. Jadali for his services rendered during the entire employment period by paying him a commission based on 50 percent of his receipts. As discussed, the opening sentence of ¶ 3 refers to Dr. Jadali's "compensation *for services rendered during the employment period*."²⁴ The contract contains no language requiring Dr. Jadali to render services *without* compensation for any portion of the employment period; rather, his entitlement to compensation extends to "the employment period," which reasonably means the *entire* employment period.

This interpretation is consistent with Dr. Jadali's testimony that he was working on a 50 percent commission, that the contract says that he is paid for services rendered, and that he did not believe that he was working for free during the final month of his employment. Also, although the contract requires consideration of collected receipts as of the last day of the month immediately preceding the date of calculation, the contract does not preclude further calculations from occurring as more receipts are collected. Further, given the delays in collection of receipts from insurance carriers due to the nature of Dr. Jadali's practice, interpreting the contract to bar compensation for amounts collected after Dr. Jadali's employment ended would defeat the purpose of the compensation provision, that is, to pay Dr. Jadali a 50 percent commission for services that he rendered during the employment period.

To be sure, defendants presented evidence that could have supported a finding that the parties did not intend to include post-termination collections in the calculation of Dr. Jadali's commission. Defendants elicited testimony regarding the economics of a medical office, including the initial start-up costs that are incurred when a doctor is hired and the need to retain post-termination collections to compensate for those initial costs. Defendants also presented evidence that retention of post-termination collections by the employer is a standard practice in

²¹ *Klapp v United Ins Group Agency, Inc.*, 468 Mich 459, 469; 663 NW2d 447 (2003), quoting 11 Williston, Contracts (4th ed), § 30.7, pp 87-91.

²² *Klapp*, 468 Mich at 469.

²³ *Id.* at 470-473.

²⁴ Emphasis added.

the medical field for non-partner employees. Although such a practice may be common, however, the parties' agreement here did not clearly and unambiguously adopt such a practice.

Viewing the evidence and legitimate inferences in the light most favorable to Dr. Jadali, we conclude that sufficient evidence existed to present a factual question for the jury regarding the intended meaning of the compensation paragraph. Thus, the trial court properly denied defendants' motions for directed verdict and JNOV on this issue.

C. DEDUCTION OF MICHIGAN NEUROLOGY ASSOCIATES' PAYMENT INTO PENSION PLAN

Defendants argue that insufficient evidence was presented to create a factual question for the jury regarding whether Michigan Neurology Associates breached the employment agreement by deducting a \$10,500 employer pension contribution from Dr. Jadali's compensation.

We again conclude that the contractual language at issue is ambiguous. The employment agreement may be reasonably understood in different ways on the question whether an employer pension contribution is a "direct doctor benefit" that may be deducted from Dr. Jadali's compensation. Paragraph 3(a)(ii) requires the deduction of Dr. Jadali's "draw [on his commission] as set forth in section 3(a) above that has been advanced to Doctor as of the date of this calculation *plus direct Doctor benefits*."²⁵ The contract does not define the term "direct doctor benefits." However, "[c]ourts may consult dictionary definitions to ascertain the plain and ordinary meaning of terms undefined in an agreement."²⁶ The most relevant definition of "direct" is "without intermediary agents, conditions, etc.; immediate: *direct contact*."²⁷ It is undisputed that Dr. Jadali is a doctor. And *Random House Webster's College Dictionary* (2001) defines "benefit" as "something that is advantageous or good" or "a payment made to help someone or given by a benefit society, insurance company, or public agency."

Because the pension contribution is a payment placed in an account for Dr. Jadali's use, it is a benefit to Dr. Jadali. On the other hand, reasonable minds could differ regarding whether the benefit is direct, that is, immediate or without conditions, given that it is partially subject to vesting requirements, thus denying Dr. Jadali full access to it. The degree of immediacy or accessibility required to render a doctor's benefit "direct" is not clear from the contractual language. Therefore, we conclude that the term "direct doctor benefits" is equally susceptible of more than one meaning, rendering it ambiguous.²⁸

Moreover, interpreting ¶ 3(a)(ii) to permit deduction of the pension contribution from Dr. Jadali's compensation would conflict with the language in ¶ 6 stating that Dr. Jadali "may be eligible to participate in [Michigan Neurology Associates'] Pension Plan (the 'Plan') pursuant to

²⁵ Emphasis added.

²⁶ *Holland v Trinity Health Care Corp*, 287 Mich App 524, 527-528; 791 NW2d 724 (2010).

²⁷ *Random House Webster's College Dictionary* (2001) (emphasis in original).

²⁸ *Coates*, 276 Mich App at 503.

the eligibility provisions and other terms and conditions contained therein” It is undisputed that the \$10,500 contribution at issue was made as part of the *employer* contribution portion of the pension plan and that Michigan Neurology Associates had to pay the money into the plan to qualify for tax deferred status. Therefore, interpreting ¶ 3(a)(ii) to permit deduction from an *employee’s* compensation to pay for the pension contribution would conflict with ¶ 6 requiring adherence with the terms and conditions of the plan providing for an *employer* contribution. The conflict between these provisions further supports the conclusion that the employment agreement is ambiguous on the question whether the pension contribution is a direct doctor benefit that may be deducted from Dr. Jadali’s compensation.

Further, there was sufficient evidence to present a triable issue for the jury regarding the intended meaning of the ambiguous contractual language. The contractual language and relevant extrinsic evidence support a conclusion that the contracting parties did not intend to permit deduction of an *employer* contribution from Dr. Jadali’s compensation as a “direct doctor benefit.” Although the placement of funds into the pension account was a benefit to Dr. Jadali, reasonable minds could differ regarding whether the benefit was *direct*, that is, immediate or without condition, given that it was partially subject to vesting requirements. Moreover, the language in ¶ 6 stating that Dr. Jadali may participate in the pension plan pursuant to the terms and conditions of the plan, which required that the *employer* make the contributions at issue, supports a conclusion that Michigan Neurology Associates should pay the funds itself rather than act as a mere conduit by deducting the entire contribution from Dr. Jadali’s pay. Indeed, Dr. Jadali testified that he understood the employment agreement to require Michigan Neurology Associates to make the contribution given that the money was supposed to come from the employer and Dr. Jadali did not have full access to the funds given the vesting requirement. Therefore, we conclude that a factual question existed upon which reasonable minds could differ and that the trial court did not err in denying defendants’ motions for directed verdict and JNOV on this issue.

D. DEDUCTIONS FOR MISSED WORK

Defendants argue that Dr. Jadali presented insufficient evidence to create a factual question for the jury regarding whether the deduction of \$11,753 from his pay for days missed due to medical emergencies constituted a breach of the employment agreement and a violation of the FMLA.²⁹

We again conclude that the contractual language at issue is ambiguous. The employment agreement may be reasonably understood in different ways on the question whether Michigan Neurology Associates may deduct money from Dr. Jadali’s compensation for time off due to medical reasons. The contract contains no provision addressing sick leave. The agreement is thus unclear regarding whether and how any missed days of work due to medical emergencies affect the calculation of Dr. Jadali’s compensation under ¶ 3.

²⁹ 29 USC 2601 *et seq.*

There was sufficient evidence to present a triable issue for the jury regarding the intended meaning of the ambiguous contractual language. The contractual language and relevant extrinsic evidence support a conclusion that the contracting parties did not intend to permit Michigan Neurology Associates to deduct money from Dr. Jadali's compensation for days missed due to medical emergencies. Dr. Jadali did not seek to be paid for the days that he missed; rather, he challenges Michigan Neurology Associates' deduction of \$11,753, the loss that it claims to have suffered because Dr. Jadali did not generate income during his appendectomy and his wife's miscarriage. Paragraph three of the employment agreement, which provides the method of calculating Dr. Jadali's compensation, contains no language permitting a deduction for medical emergencies. The contract provides for a deduction of Dr. Jadali's draw on his commission and "direct doctor benefits," but it does not provide for a deduction based on revenue allegedly lost because of missed work. Further, Michigan Neurology Associates' practice manager was not aware of any other instances in which Michigan Neurology Associates deducted money from an employee's pay for taking a medical leave of absence. Thus, sufficient evidence existed to present factual questions for the jury regarding whether the parties intended to permit a deduction from Dr. Jadali's pay for lost revenue during his medical absences and whether Michigan Neurology Associates breached the employment agreement by making such a deduction.

Dr. Jadali also established a factual issue for the jury regarding whether the \$11,753 deduction violated the FMLA.

Established in 1993, the FMLA represents an attempt to reconcile "the demands of the workplace with the needs of families" 29 USC 2601(b)(1). Thus, while Congress sought to provide employees the right to "take reasonable leave for medical reasons," it also sought to do so "in a manner that accommodates the legitimate interests of employers." 29 USC 2601(b)(2) and (3). The FMLA applies to private-sector employers of fifty or more employees. 29 USC 2611(4). An eligible employee is entitled to twelve work weeks of unpaid leave during any twelve-month period because of, among reasons, "a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 USC 2612(a)(1)(D). At the conclusion of a qualified leave period, the employee is entitled to reinstatement to his former position, or to an equivalent one, with the same terms and benefits. 29 USC 2614(a). The FMLA makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under" the FMLA. 29 USC 2615(a)(1).^[30]

Here, it is undisputed that Michigan Neurology Associates had 50 or more employees during Dr. Jadali's medical leave and was thus subject to the FMLA. Further, Dr. Giancarlo took Dr. Jadali at his word that he missed the days in question due to his appendectomy and his wife's miscarriage. The only question is whether sufficient evidence existed that Michigan Neurology

³⁰ *Woodman v Miesel Sysco Food Serv Co*, 254 Mich App 159, 166-167; 657 NW2d 122 (2002).

Associates violated the FMLA by deducting \$11,753 from Dr. Jadali's pay for lost productivity during his medical absences.

As discussed, 29 USC 2615(a)(1) makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under" the FMLA.³¹ An eligible employee is entitled to 12 work weeks of unpaid leave during any 12-month period for, among other reasons, "a serious health condition that makes the employee unable to perform the functions of the position of such employee," or to care for a spouse with a serious health condition.³² Here, Michigan Neurology Associates allowed Dr. Jadali to take unpaid time off for his emergency appendectomy and to care for his wife during a miscarriage. However, Michigan Neurology Associates essentially imposed a financial penalty for exercising that right by charging Dr. Jadali \$11,753 for lost productivity because he did not generate revenue during his appendectomy and his wife's miscarriage. Reasonable jurors could find that such a financial penalty restrained or interfered with Dr. Jadali's exercise of or attempt to exercise his right to unpaid leave. Accordingly, we conclude that Dr. Jadali submitted sufficient evidence to create a factual question regarding whether Michigan Neurology Associates violated the FMLA.

IV. LIQUIDATED DAMAGES

A. STANDARD OF REVIEW

Defendants argue that the trial court abused its discretion in imposing liquidated damages of \$11,753 for Michigan Neurology Associates' violation of the FMLA. This Court reviews for an abuse of discretion a trial court's decision regarding whether to award or reduce liquidated damages under the FMLA.³³ "An abuse of discretion occurs when a court selects an outcome that is not within the range of reasonable and principled outcomes."³⁴

B. LEGAL STANDARDS

Liquidated damages are to be awarded under the FMLA "unless such amount is reduced by the court because the violation was in good faith and the employer had reasonable grounds for believing the employer had not violated the Act." 29 CFR 825.400(c). As explained by the court in *Chandler v Specialty Tires of America (Tennessee), Inc.*, 283 F3d 818, 827 (CA 6, 2002):

Section 2617(a)(1)(A)(iii) of the FMLA provides that, in addition to compensatory damages specified in § 2617(a)(1)(A)(i) & (ii), an employer shall be liable for an amount of liquidated

³¹ *Id.*

³² 29 USC 2612(a)(1)(C) and (D).

³³ *Woodman*, 254 Mich App at 192.

³⁴ *Borowsky v Borowsky*, 273 Mich App 666, 672; 733 NW2d 71 (2007).

damages equal to the amount of wages, salary, employment benefits, or other compensation denied or lost to an employee, plus interest, by reason of the employer's violation of § 2615 of the statute. However, the district court may reduce that award to only compensatory damages if the employer "proves to the satisfaction of the court that the act or omission which violated section 2615 of this title was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 2615." 29 USC 2617(a)(1)(A)(iii). The employer must therefore show *both* good faith *and* reasonable grounds for the act or omission. *Dole v Elliott Travel & Tours, Inc*, 942 F2d 962, 968 (CA 6, 1991).

The decision whether to reduce the damages is within the discretion of the trial court. 29 USC 2617(a)(1)(A)(iii); *Nero v Industrial Molding Corp*, 167 F3d 921, 928 (CA 5, 1999).^[35]

The trial court must exercise its discretion consistently with the strong statutory presumption in favor of doubling the damages.³⁶

C. ANALYSIS

Here, in awarding liquidated damages under the FMLA, the trial court stated:

In the case at bar, the jury awarded plaintiff damages of \$11,753 for defendants' violation of the FMLA. Defendants have failed to prove to the satisfaction of this Court that their violation of the Act was in good faith. Nor have defendants proven to the Court's satisfaction that they had reasonable grounds for believing that their actions were not in violation of the Act. Therefore, the Court finds that liquidated damages in the amount of \$11,753 are warranted.

The trial court's decision fell within the range of reasonable and principled outcomes. Defendants failed to establish that Michigan Neurology Associates acted in good faith or that it had reasonable grounds for believing that it had not violated the FMLA. Dr. Giancarlo and Michigan Neurology Associates' practice manager knew that the reason Dr. Jadali missed work was because of an emergency appendectomy and his wife's miscarriage. Despite this knowledge, Dr. Giancarlo charged Dr. Jadali \$11,753 for lost productivity for the days he was absent. Dr. Giancarlo acknowledged that even if he had not deducted the \$11,753, Dr. Jadali would still have been unpaid for the missed days. Thus, Dr. Giancarlo should have understood that the deduction constituted a financial penalty that went beyond merely not paying Dr. Jadali

³⁵ *Woodman*, 254 Mich App at 191-192 (emphasis in original).

³⁶ *Arban v West Publishing Corp*, 345 F3d 390, 408 (CA 6, 2003).

for the missed days. Michigan Neurology Associates' practice manager was not aware of any other instances in which Michigan Neurology Associates deducted money from an employee's pay for taking a medical leave of absence. Although Dr. Giancarlo claimed to have consulted an attorney, Michigan Neurology Associates has failed to offer any specific facts establishing reasonable grounds for believing that the \$11,753 deduction did not violate the FMLA. Further, given Dr. Giancarlo's knowledge of the medical reasons for Dr. Jadali's absences, the trial court reasonably concluded that Michigan Neurology Associates had failed to establish that Michigan Neurology Associates imposed this financial penalty in good faith. Accordingly, the trial court's decision to award liquidated damages in the amount of \$11,753 was not an abuse of discretion.

We affirm.

/s/ William C. Whitbeck

/s/ Elizabeth L. Gleicher